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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 37, Original

THE STATE OF OHIO

Plaintiff,

v.

THE COMMONWEALTH OF KENTUCKY

Defendant.

MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

On March 5, 1973, this Court entered an order denying a motion by the State of Ohio for leave to amend its original complaint.

On March 20, 1973, the Court entered an order in Texas v. *Louisiana*, No. 36, Original, which appears to be inconsistent with the order of March 5, 1973.

Wherefore, the State of Ohio, by its Attorney General, asks leave to file a motion, submitted herewith, for reconsideration of the order of March 5, 1973.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 27, Original

THE STATE OF OHIO, Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant.

MOTION FOR RECONSIDERATION OF ORDER OF MARCH 5, 1973

Comes now the State of Ohio, by its Attorney General, and requests that the Court reconsider its order of March 5, 1973. Under that order Ohio was refused leave to amend its original complaint by the addition of allegations which, if true, lead to the conclusion that the boundary between the Commonwealth of Kentucky and the State of Ohio lies in the middle of the Ohio River. The Court's order of March 20, 1972, in *Texas* v. *Louisiana*, No. 36, Original, is, we respectfully submit, inconsistent with the order of March 5, 1973.

1. The order of March 5, 1973, denying Ohio's request for leave to amend its complaint, was based solely on the conclusion that Ohio had, for many years, acquiesced in Kentucky's claim of sovereignty over the northern half of the Ohio River. *Ohio* v. *Kentucky*, 410 U.S. 641, 642-643. The order placed reliance on a series of opinions by this Court, beginning with *Rhode Island* v. *Massachu-*

[illegible] 4 How. 391, 439 (1845), which contains language to the effect that one State may lose territorial rights [illegible] dominion over such territory by a sister State.

2. The order of March 20, 1973, decided, among other things, that a State [illegible] to land from the United States based on the acquiescence of the United States in the State's long continued exercise of jurisdiction. Texas v. Louisiana, 410 U.S. 702, 714. The authority cited for this holding was United States v. California, 332 U.S. 19, 39-40 (1947).

3. In California, the Court held that the United States may not be deprived of interests, which it holds in trust for all the people, either by the acquiescence of its officers, or by their laches or failure to act. 332 U.S. at 39-40. An examination of the citations given to support this principle reveals that this Court has only declined to rely on rights that States assert which apply the same rule to the Government now. [illegible]

4. In California, the Court was concerned with the rule, as between the United States and the State of California, to the three mile belt of soil under the navigable sea. The opinion discusses at considerable length, the inland water rule of Pollard's Lessee v. Hagan, 3 How. 212 (1845), in which the Court held that the original States, as well as the States later admitted to the Union on an equal footing, owned the soil beneath the navigable waters within their boundaries, in trust for their people, and as an inseparable attribute of State sovereignty. In the California case the United States questioned the validity of Pollard Hagan, as it had held that ownership of the soil beneath navigable waters is inherently incident of State sovereignty. But the Court

refused to accept this argument and stated that it had reasserted this basic doctrine of *Pollard* many times. 332 U.S. at 50-57. A sovereign State cannot abdicate its jurisdiction over the soil beneath its navigable waters, held in trust for all its people, and it can only dispose of such soil by a valid exercise of legislative power, consistent with its trust to the people of the State. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-463 (1892).

5. The line of cases upon which this Court relied in the order of March 5, 1973, must be read in the light of *Pollard's Lessee v. Hagan*, *supra*, *United States v. California*, *supra*, and *Illinois Central Railroad v. Illinois*. As already noted, the cases upon which the Court relied stem from *Rhode Island v. Massachusetts*, *supra*, in which the location of the boundary had been settled by a valid exercise of legislative power. Prior to the Revolution the two colonies had appointed commissions to meet and settle the boundary, and the recommended settlement was approved by each of the respective legislatures. Rhode Island's acquiescence was referred to in connection with this solemn agreement. 4 How. at 638-639. It will be found that in most of the other cases which follow the language of *Rhode Island*, there had also been a proper compact between the disputant States or some equivalent thereto. To read the language of those cases as holding that acquiescence, laches, or failure to act are alone sufficient to deprive a State of an attribute of its sovereignty, is to place them in conflict with *Texas v. Louisiana*, *supra*, and with *Pollard*, *California* and *Illinois Central*.

6. The Ohio River is a navigable stream, and Ohio is a sovereign State. Assuming the truth of the allegations in Ohio's proposed amended complaint as to the location of the boundary in the middle of the River, which allegations have been admitted by Kentucky for present purposes (410 U.S. at 645), the soil beneath the northern

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[redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 27, Original

THE STATE OF OHIO

Plaintiff,

v.

THE COMMONWEALTH OF KENTUCKY

Defendant.

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

Ohio was admitted to the Union in 1803, as a sovereign State, on equal footing with Kentucky and with the thirteen original States. The allegations of Ohio's proposed amended complaint, if proven, will establish that, when she became a State, Ohio's boundary with Kentucky lay at the middle of the Ohio River and that she was entitled to the soil beneath the northern half of the River. Kentucky's argument to the contrary was found to be without merit by the Special Master. (Rep. 3-4.)*

The Special Master recommended, nevertheless, that the motion to amend the complaint be denied. His reason was that, regardless of where the boundary actually lay

* References to the Report of the Special Master, filed May 13, 1977 will be designated herein as "Rep."

to the time Ohio became a State, her long acquiescence in Kentucky's claim to the northern edge of the River foreclosed Ohio's present claim to the southern half of the River. (Rep. 4-15.) The Special Master relied upon a series of cases in this Court which contain language to the effect that, in border disputes between States, long acquiescence by one in the claim of the other is conclusive. (Rep. 12-15.) In an opinion dated March 5, 1973, this Court accepted the Special Master's recommendation and cited the same cases, *Ohio* v. *Kentucky*, 410 U.S. 641, 650-651 (1973).

On March 20, 1973, this Court handed down its opinion in *Texas* v. *Louisiana*, 410 U.S. 702, in which it held, among other things, that a State may not acquire territory from the United States by prescription and acquiescence. 410 U.S. at 714. We respectfully submit that the same rule holds good for any sovereignty, that a sovereign State can no more be deprived of its territory by mere acquiescence than can the sovereign United States; and that the cases upon which this Court relied in its opinion of March 5, 1973, must be read in the light of this principle.

An original action in this Court is, of course, a trial, and interlocutory orders entered therein are open to reconsideration at any time prior to final judgment.

ARGUMENT

I. The Order of March 5, 1973.

The basis of this Court's denial of leave to amend Ohio's complaint appears in the following paragraph in the opinion of March 5, 1973 (410 U.S. at 650-651):

> (a) Ohio does not say that its failure to assert its claim over the past century and a half is due to any

Jurisdiction, 332 U.S. 19 (1947), and (c) *Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

a.) *Texas v. Louisiana*. The Court decided that the boundary between the two States had been established at the middle of the Sabine River in 1848. However, since there was some evidence that islands in the western half of the river were owned by the United States prior to 1848, the case was remanded to the Special Master to permit the government to state its claim. Texas had argued that such claim had been lost by prescription and acquiescence. The Court brushed aside this contention with the statement that the United States could not lose territory by acquiescence. The opinion says (410 U.S. at 713, 714):

> It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. *Scott v. Lattig*, 227 U.S. 229, 242-243 (1913); *County of St. Clair v. Lovingston*, 23 Wall. 46, 68 (1874); *Pollard's Lessee v. Hagan*, 3 How. 212, 228-230 (1845). But the rule does not reach islands or fast lands located within such waters. Title to islands remains in the United States. * * *
>
> * * * * * * * * * * * *
>
> * * * Texas claims any such islands existing prior to 1848 by prescription and acquiescence, but, plainly, a State may not acquire property from the United States in this manner. *United States v. California*, 332 U.S. 19, 39-40 (1947).

b.) *United States v. California*. The issue was the ownership of the three mile belt of soil beneath the marginal sea. California contended that, since it had been admitted to the Union on equal footing with the original States, its ownership of the sub-soil of the marginal sea followed from the rule announced in *Pollard's Lessee v.*

Hagen rule. This Court's opinion in *California* described that rule as a holding, 332 U.S. at 30, that

> the original States entered in trust for their people the navigable sidewalks between high and low water mark within each state's boundaries, and the soil beneath them, as an inseparable attribute of state sovereignty.

The Government questioned the validity of *Pollard* insofar as it held that ownership of the soil beneath navigable waters is a necessary incident of State sovereignty. This Court did not accept this argument, pointing out that it had frequently reasserted this basic doctrine of *Pollard*. 332 U.S. at 30-31. It did, however, limit the extent of the *Pollard* rule to inland waters, and held for the United States on the ground that the soil beneath the marginal sea is an attribute of external national sovereignty. 332 U.S. at 35-40. Finally, in response to California's argument that the federal government had lost its claim through acquiescence in the State's exercise of sovereignty, the Court said:

> And even assuming that Government agents may have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this area [are] not to be forfeited as a result. The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act." (332 U.S., at 39-40; footnote citing cases omitted.)

Pollard's Lessee v. Hagen. The question was

ownership of a lot which had been under navigable water within the boundaries of Alabama at the time that State was admitted to the Union. One party claimed under a grant from the United States, the other, under an Alabama grant. The Court's opinion notes (3 How. 220) that "this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy, * * *." The Court held, as we have just shown from the references to *Pollard* in *Texas* and *California*, that any State which entered the Union after the Revolution acquired title to the soil beneath the navigable waters within its boundaries, in trust for the people of the State, as an inseparable attribute of its sovereignty. In addition to the passages already quoted the opinion says (3 How. at 221, 222-223, 228-229, 230):

> * * * The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed. * * *
>
> * * * * * * * * *
>
> * * * When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it to the same extent, in all respects, that it was held by the states ceding the territory.
>
> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign powers. * * *
>
> * * * * * * * * *

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original States. * * * There to Alabama belong the navigable waters, and soils under them, subject only to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

* * * * * * * * *

* * * This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of public powers. * * *

In brief summary of these three cases, it is clear that both the United States, and the individual States of the Union, possess sovereign powers; that both the United States, and the individual States as an inseparable incident of such sovereignty, hold the lands beneath the navigable waters within their respective jurisdictions in trust for their respective peoples; and that the only limitations upon the title of any individual State to such lands are to be found in the powers surrendered to the United States under the Constitution. We think it follows that a State can no more be deprived of such trust property, by mere acquiescence in an adverse claim, than can

the United States. And we think it will become apparent from the next section that this Court has recognized that principle.

III. A Sovereign State Cannot Be Deprived of Such Lands By Mere Acquiescence.

In the above quotation from *United States* v. *California*, in which the Court held that the United States could not be deprived of trust property by acquiescence, we noted that a footnote containing authorities for that proposition had been omitted. 332 U.S. at 40. One of those authorities is *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409, (1917), which in turn cited a number of this Court's previous cases on the same point. But the *Utah Power* opinion also cites *State ex rel. Lott* v. *Brewer*, 64 Ala. 287, 298 (1879), *State* v. *Brown*, 67 Ill. 435, 436 (1873), and *Den* v. *Lunsford*, 20 N. Car. 407 (1839), all of which hold that a sovereign State may not be deprived of its property by the acquiescence or laches of its officers. The following passage from the *Brown* case is typical:

> It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at a fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officials, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.
>
> The doctrine is well settled that no *laches* can be imputed to the government, and by all the same

reasoning which excuses it from laches; and on the same grounds it should not be affected by the negligence or even willfulness of any one of its officials. (87 Ill. at 438.)

The reliance upon these State cases, we respectfully submit, shows that this Court recognized all sovereignties as equally entitled to the benefit of the rule. Furthermore, the Court has held that a State may only dispose of the soil beneath its navigable waters by a valid exercise of its legislative power consistent with its trust for the people of the State, and that any legislative disposition inconsistent with such trust is void. In *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-454, 454-455, 460 (1892), the Court said:

> * * * the State holds title to the lands under the navigable waters of Lake Michigan, within its limits, * * * It is a title held in trust for the people of the State that they may enjoy the navigation * * *, carry on commerce * * *, and have liberty of fishing therein freed from the obstruction or interference of private parties.
>
> * * * It is *grants of parcels of land under navigable waters*, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being reclaimed, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very *different doctrine from the one which would* sanction the *abdication of the general control* of the state over *lands under the navigable waters of an entire harbor or bay*, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of a State to preserve such waters for the use of the

public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. *The control of the State for the purposes of the trust can never be lost*, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * * So with trusts connected with public property, or property of a special character, like *lands under navigable waters*, they cannot be *placed entirely beyond the direction and control of the State*.

* * * * * * * * *

* * * It is hardly conceivable that a legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust under which it is held. So would a similar transfer to a corporation of another State. *It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the State itself.* * * *

* * * * * * * * *

* * * We hold, therefore, that any attempted cession of the ownership or control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, * * *. (Emphasis supplied.)

The Supreme Court of the State of Ohio adopted the reasoning of *Illinois Central* in two cases involving own-

ership of the soil beneath the waters of Lake Erie. In *State* v. *Cleveland & Pittsburgh Railroad Co.*, 94 Ohio St. 61, 79, 80 (1916), that court said:

> As shown, the state holds title to the subaqueous land as trustee for the protection of public rights. The power to prescribe * * * regulations resides in the legislature of the State.
>
> * * * * * * * * *
>
> The state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created. (Emphasis supplied.)

And in *State, ex rel. Squires* v. *Cleveland*, 150 Ohio St. 303, 322-326, 336-339 (1948), the court strongly reaffirmed its prior holding.

In short, a sovereign State holds the soil beneath navigable waters within its boundaries in trust for all its people. It cannot be deprived of such trust property by mere acquiescence in the adverse possession of another State, and it can only dispose of it by legislative action consistent with the purpose of the trust under which it is held. See also *Martin* v. *Waddell*, 16 Pet. 367 (1842); *Barney* v. *Keokuk*, 94 U.S. 324, 337 (1876); *Shively* v. *Bowlby*, 152 U.S. 1 (1893); *Massachusetts* v. *New York*, 271 U.S. 65 (1926); *United States* v. *Maine*, No. 35, Original, Motion of United States for Judgment, p. 37.

IV. The Cases Relied On in the Order of March 5, 1973, Must Be Read in the Light of the Above Principles.

Ohio is a sovereign State of the Union, and the Ohio River is a navigable stream. If it be assumed that the allegations as to the location of the boundary in Ohio's proposed amended complaint can be established, and they

have been admitted by Kentucky for present purposes (410 U.S. at 645), the soil beneath the northern half of the River belonged to Ohio in trust for the people of the State at the time of her admission to the Union. In the order of March 5, 1973, this Court ruled that, regardless of the justice of Ohio's historical claim, she had lost the right to assert it because of the long acquiescence of her officials in the adverse claim of Kentucky. 410 U.S. 641, 648-652. The Court relied on a series of cases which begin with *Rhode Island* v. *Massachusetts*, 4 How. 591 (1846).

The *Rhode Island* case was the first boundary dispute between States to be litigated to a conclusion before this Court. That litigation continued for many years as the Court carefully picked its way through an unfamiliar field, which, though political in nature, had been committed to its jurisdiction under the Constitution. See 12 Pet. 657 (1838); 13 Pet. 23 (1839); 14 Pet. 210 (1840); 15 Pet. 233 (1841); 4 How. 591 (1846). In the last of these decisions, written by Justice McLean, the Court finally rejected Rhode Island's claim on the ground that, in 1711 and again in 1718, the legislature of the Colony of Rhode Island had formally agreed with the legislature of the Colony of Massachusetts as to the location of the boundary, and that, thereafter, Rhode Island had acquiesced in this agreement for forty or fifty years before beginning its effort to have it set aside on the ground that it was based on a mistake. 4 How. at 638-639. This is the opinion on which this Court now relies.

One of the earlier opinions in this series has been cited at times in support of the defense of acquiescence. *Rhode Island* v. *Massachusetts*, 14 Pet. 210 (1840). Chief Justice Taney, writing for the majority there, held that a formal legislative agreement between States, and acquiescence

Missouri v. Iowa, 7 How. 660, 670-674 (1849). We do not

say that the line between mere acquiescence in adverse possession and acquiescence in a proper legislative act has always been carefully drawn in these opinions. But, as this Court said in *Illinois Central Railroad* v. *Illinois*, *supra*, 146 U.S. at 453:

> * * * General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. * * *. (Emphasis supplied.)

To construe the language of these cases as this Court has done in its order of March 5, 1973, is to read them in a way which conflicts with *California*, *Pollard* and *Illinois Central Railroad*.

The State of Ohio, which, for present purposes, must be assumed to have included the soil beneath the northern half of the Ohio River within her boundaries at the time she entered the Union, has never taken any legislative action to dispose of that trust property. Efforts were made in 1813, in 1848, in 1877, in 1958, and perhaps at other times, to work out a settlement of the location of Ohio's boundary in the River. All were futile. The acquiescence of her officials in the adverse possession of Kentucky, and their laches in asserting her trust rights, cannot deprive the State of Ohio of those rights, any more than the acquiescence and laches of federal officials could deprive the United States of her trust property in the soil beneath the marginal sea in *United States* v. *California*, *supra*. And the State of Ohio, not being a party to either *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), or *Indiana* v. *Kentucky*, 136 U.S. 479 (1890), to which this Court referred in the order of March 5, 1973, is not bound by those decisions. *Fowler* v. *Lindsey*, 3 Dallas 411

CONCLUSION

In view of the foregoing, the Court's order of March 5, 1973, should be reconsidered.

Respectfully submitted,

WILLIAM J. BROWN
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WILLIAM B. SAXBE
United States Senator
from the State of Ohio,
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October, 1973.

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CERTIFICATE OF SERVICE

I, Joseph M. Howard, Assistant Attorney General of The State of Ohio, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1973, I served copies of the foregoing motion for leave to file, motion for reconsideration and brief in support, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky.

JOSEPH M. HOWARD
Assistant Attorney General